

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5846 of 2010

and

SPECIAL CIVIL APPLICATION No.5847 of 2010

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SADBHAV ENGINEERING LTD - Petitioner(s)

Versus

DEPUTY COMMISSIONER OF INCOME-TAX (OSD), CIRCLE-8 & 1 - Respondent(s)

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**Appearance :**

MR RK PATEL with MR BD KARIA with MS PAURAMI SHETH for Petitioner  
MR MR BHATT, SR. ADVOCATE with MRS MAUNA M BHATT for Respondents

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**CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA**

and

**HONOURABLE MS.JUSTICE H.N.DEVANI**

**Date: 20/07/2010**

**ORAL ORDER**

**(Per: HONOURABLE MS.JUSTICE H.N.DEVANI)**

1. These two petitions have been filed with the following prayers :

*[A] Issue a writ of certiorari and/or a writ of mandamus and/or any other writ, direction or order to quash and set aside the impugned notice dated 29.03.2010 under section 148 of the Income-tax Act, 1961 annexed hereto at Annexure D along with preliminary order dated 4.5.2010 annexed hereto at Annexure H for proceeding and completing reassessment proceedings.*

*[B] Pending admission, hearing and disposal of this petition, ad-interim relief be granted and the respondent be ordered to restrain from enforcing compliance of the impugned notice dated 29.03.2010 at Annexure D and/or taking any other steps in this regard including ex-parte order or implementation of preliminary order dated 4.5.2010 at Annexure H .*

*[C] Pending admission, hearing and disposal of this petition, stay the implementation/operation of the notice and orders to restrain the respondent from taking any further proceedings pursuant to the impugned notice dated 29.03.2010 at Annexure D including stay of operation of preliminary order dated 4.5.2010 at Annexure H .*

*[D] Award the cost of this petition.*

*[E] Grant such other and further reliefs as this Hon'ble Court deems fit.*

2. Since common questions of fact and law are involved in both these petitions, the same were taken up for hearing together and are disposed of by this common judgment.
3. For the sake of convenience, reference is made to the facts as appearing in Special Civil Application No.5846 of 2010. The petitioner Company had filed return of income for assessment year 2004-05. Scrutiny assessment was framed under section 143(3) of the Income Tax Act, 1961 (the Act), wherein there was partial disallowance under section 80IA (4) of the Act. The petitioner carried the matter in appeal before Commissioner (Appeals), who dismissed the appeal insofar as ground relating to section 80IA (4) of the Act is concerned. Against the said order the petitioner has preferred second appeal before the Income Tax Appellate Tribunal, which is still pending.
4. In the meanwhile, vide the impugned notice dated 29.3.2010, issued under section 148 of the Act, respondent No.1 has sought to reopen the assessment for assessment year 2003-04. In response to the said notice, the petitioner submitted its reply dated 01.04.2010 requesting that the return of income filed originally be treated as a return filed in response to the notice under section 148. The petitioner also requested for a copy of the reasons recorded for reopening the assessment under section 148. Upon being furnished with a copy of the reasons recorded for reopening the assessment, the petitioner submitted objections to the reassessment proceedings under section 147 of the Act. The respondent No.1 vide order dated 4.5.2010, rejected the objections raised by the assessee to reassessment proceedings for assessment year 2003-04. The facts of Special Civil Application No.5847 of 2010 are also similar, wherein notice under section 148 for reopening assessment under section 147 has been issued in relation to assessment year 2004-05. Being aggrieved, the petitioner has moved the present petitions, seeking the reliefs noted hereinabove.
5. Mr. R. K. Patel, learned advocate for the petitioner has vehemently assailed the impugned notices on various grounds. However, considering the view that the court is inclined to take in the matter, it is not necessary to refer to all the contentions raised by the learned advocate for the petitioner. In the present petitions, the main ground for assailing the impugned notice is that in absence of any allegation that the petitioner has failed to furnish fully and truly all material facts necessary for its assessment for the relevant assessment years, the impugned notices which are issued beyond a period of four years from the end of the relevant assessment years are invalid in the light of the first proviso to section 147 of the Act and as such the very initiation of proceedings under section 147 of the Act is bad.
6. On the other hand, Mr. M. R. Bhatt, learned Senior Advocate appearing for the respondents has opposed the petition and reiterated what is stated in the affidavit

- in reply filed on behalf of the respondents. Dealing with the contention that there was no failure on the part of the petitioner in disclosing fully and truly all material facts relevant for its assessment, attention was invited to the reasons recorded for reopening the assessments under section 147, to submit that in the light of the amendment of section 80IA vide Finance (No.2) Act, 2009 with retrospective effect from 01.04.2000, it is deemed that the assessee had submitted untrue facts at the relevant point of time and as such the provisions of section 147 are clearly attracted.
7. As can be seen from the averments made in the petition, more particularly paragraphs 4, 6, 7, and 10 thereof it has been specifically contended therein that the notices under section 147 of the Act are invalid in view of the fact that the same have been issued beyond the period of four years from the end of the relevant assessment years. However, though affidavit in reply has been filed on behalf of the respondents, the said contention has not been dealt with and remains uncontroverted.
  8. In the facts of the present case, relevant assessment years are 2003-04 and 2004-05. The notice under section 148 of the Act relating to assessment year 2003-04 has been issued on 29.03.2010, whereas the notice under section 148 of the Act relating to assessment year 2004-05 has been issued on 29.4.2010. Computing the period between the end of the relevant assessment years and the date of issuance of the notices under section 148, it is evident that both the notices have been issued beyond a period of four years from the end of the relevant assessment years. The first proviso to section 147 of the Act, lays down that where an assessment under sub-section (3) of section 143 or the said section has been made for the relevant assessment year, no action shall be taken under the section after expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment. Thus, for the purpose of invoking section 147 after the expiry of four years from the end of the relevant assessment year, the income chargeable to tax should have escaped assessment by reason of failure on the part of the assessee either (i) to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148, or (ii) to disclose fully and truly all material facts necessary for his assessment. In the facts of the present case, it is an undisputed position that there is no failure on the part of the assessee insofar as the first condition is concerned. Insofar as the second condition, viz. failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment is concerned, on a plain reading of the reasons recorded, it is apparent that the same are totally silent as regards any failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for the relevant assessment years. From the reasons recorded it is apparent the assessments are sought to be reopened on the ground that as per the explanation given below sub-section (13) of section 80IA of the Act, which has been substituted by the Finance Act No.2 of 2009 with retrospective effect from 1.4.2000, deduction under section 80IA would not be admissible to an assessee who carries on business which is in the nature of works contract. That the petitioner assessee being a civil contractor working for the Government is not eligible for deduction under section 80IA as claimed by the assessee, hence there was reason to believe that income chargeable to tax has

- escaped assessment for the assessment years under consideration. The record of the case does not in any manner indicate that proceedings under section 147 are sought to be reopened by reason of failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for assessment years under consideration. The respondent in its affidavit in reply also has not disputed the fact that there is no failure on the part of the petitioner to disclose fully and truly all material facts. Only by way of submission advanced before the Court it is contended that in the light of the amendment of section 80IB, it is deemed that the petitioner has failed to disclose the correct facts. As to whether or not there is any failure on the part of the assessee in disclosing fully and truly all material facts necessary for his assessment, is a matter of fact and there can be no deemed failure as is sought to be contended on behalf of the respondents. In the circumstances, in absence of any failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for the assessment years under consideration, the notices under section 148 of the Act having been issued after the expiry of a period of four years from the end of the relevant assessment years, the very initiation of proceedings under section 147 of the Act stand vitiated and as such cannot be sustained.
9. For the foregoing reasons, the petitions succeed and are, accordingly, allowed. The impugned notices dated 29.3.2010 and 29.4.2010 respectively, issued under section 148 of the Income Tax Act, 1961, are hereby quashed and set aside. Rule is made absolute accordingly in each of the petitions.
  10. Registry is directed to keep a copy of this order in each of the petitions.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]